

June 13, 2005

Craig A. Steele
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**Re: Your Request for Advice
Our File No. A-05-071**

Dear Mr. Steele:

This letter is in response to your request, on behalf of the Mission Viejo City Manager, Dennis Wilberg, and two members of the city council, Patricia Kelley and Lance MacLean, for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹

QUESTION

To the extent that councilmembers Kelley and MacLean have conflicts of interest in decisions regarding litigation in which they are named as defendants, may they make such decisions under the “legally required participation” rule stated at section 87101 and regulation 18708?

CONCLUSION

Since only two (of five) members seem *not* to have conflicts of interest as parties to the lawsuit, to assemble a decisionmaking quorum of the city council one member who has such a conflict of interest must be selected under the “legally required participation” exception to the Act’s conflict of interest rules. If defendants can assert the lawyer-client or similar legal privilege to bar participation in litigation decisions by a council member who is suing her colleagues on the city council, the “legally required participation” rule will not be construed to compel defendants to waive their right to assert the privilege.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

The City of Mission Viejo is a general law city in Orange County. The five-member city council is the city's chief governing body. An appointed city manager, Dennis Wilberg, administers the city's day-to-day operations. The current members of the city council are Mayor Patricia Kelley, Lance MacLean, Frank Ury, Gail Reavis and John Paul Ledesma. On March 16, 2005, councilmember Reavis filed a government tort claim pursuant to Government Code section 910, seeking \$10,025,000.00 in damages from defendants that included the city itself, councilmembers Kelley, MacLean and Ury, city attorney Peter Thorson, and a city employee who had filed a "hostile workplace" grievance against Ms. Reavis.² The claim against Ms. Reavis was settled by the city, and the events surrounding that settlement ultimately gave rise to the claim by Ms. Reavis against the city. Ms. Reavis' claim is deemed by operation of law to have been denied on or about April 30, 2005, which entitled Ms. Reavis to litigate that dispute in court.

On June 6, Ms. Reavis accordingly filed a civil Complaint in the Orange County Superior Court seeking general and punitive damages for alleged abuse of process, denial of due process and conspiracy relating to events surrounding the city council's vote to settle the employee's claim against Ms. Reavis. At present, the Complaint names as defendants only councilmembers Kelley and MacLean, two of the council members who voted to approve the settlement, Kathy Rios, the city employee whose had filed the "hostile workplace" claim, and 25 "Doe" defendants. Under the California Rules of Civil Procedure, a plaintiff may amend a Complaint at a later date to substitute the names of specific defendants in place of some or all of the fictitious "Doe" defendants. It is not possible at this point to determine whether Ms. Reavis will amend her Complaint to name further defendants. But Ms. Reavis' decision to omit three *other* defendants named in her original claim – the City of Mission Viejo, councilmember Frank Ury, and city attorney Peter Thorson, is unexplained and could be reversed at any time.

The city is insured by the California Joint Powers Insurance Authority ("CJPIA"). The city believes that whether or not the Complaint is amended to name the city as a defendant, if councilmember Reavis were successful in this lawsuit, the city would bear ultimate liability for at least some part of the judgment, and it has therefore tendered the defense of this action to its insurer CJPIA, which has agreed to undertake the defense.

Although the city's insurer will provide the legal defense, the city council must fulfill the responsibilities of the "client" in making fundamental litigation decisions. Specifically, under Government Code section 36936, any decision by the city authorizing a payment for settlement of a lawsuit, or indemnification of losses to public officials or

² Mr. Thorson has notified the city council that he would abstain from taking part in any governmental decision related to this litigation due to a potential conflict of interest. While he has not been named in the Complaint as a defendant, his firm may be required under its contract with the city to indemnify the city for losses arising out of the firm's performance as city attorney. It has not yet been determined whether or how that contractual provision would apply in this matter, but Mr. Thorson presumably has an economic interest in the firm as a source of income, and potentially a conflict of interest in any governmental decision that would foreseeably have a material financial effect on his law firm.

employees, requires a majority vote of the city council. Because an affirmative vote of at least three council members is required for any decision of the city council, three councilmembers must be qualified and eligible to vote on any expenditure of funds and, indeed, on any city council decision relating to the litigation you have described.

You anticipate that the city council will work out its response to this lawsuit in closed session with its attorney at its upcoming meeting, scheduled for June 20, 2005. The decisions to be made at this meeting will include the filing of responsive pleadings (due 30 days after the Complaint was filed) and the city's indemnification of individual defendants for losses incurred by reason of this litigation, possibly including indemnification for any punitive damages that may be assessed by the court.

ANALYSIS

Although the City of Mission Viejo has not been named as a party to this lawsuit, it was identified as a party to the underlying claim, and the parties appear to recognize that the city is at least a "real party in interest" to this litigation. While not perfectly clear, plaintiff's allegations could support a finding that some or all of the defendants were acting in their official capacities, obligating the city under Government Code section 825 to pay any judgment that may be entered against these defendants, in whole or in part.³ You recognize that councilmembers Kelley, MacLean, and Reavis may have conflicts of interest in governmental decisions affecting the conduct and outcome of the litigation in which they are named parties. You ask us to assume that three of the five council members do have conflicts of interest in such litigation decisions, and that we advise you on the problem of "legally required participation" in these decisions under the peculiar circumstances of the present case.

Section 87101 provides a mechanism through which a decisionmaking body can avoid paralysis when it is impossible to assemble a quorum of members who are not disqualified from participating in a decision by section 87100, the Act's general rule governing conflicts of interest. Section 87101 provides as follows:

"Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section."

³ The Complaint appears to allege that defendants Kelley and MacLean were acting both within their official capacities and beyond the course and scope of their official duties in taking the actions that are the subject of this litigation. The point (if any) at which the actions of these defendants varied from the reasonable conduct of their official duties is not clear from the Complaint, and will have to be adjudicated by the court.

Regulation 18708 elaborates the process by which section 87101 is given effect. In brief, when a decisionmaking body cannot muster a quorum of members free from any conflict of interest as defined by section 87100, one or more of the disqualified officials – just the number to make up a bare quorum – are selected to take part in the decision at issue, and in any ancillary decisions where the conflict persists. (See, generally, the *Battersby* (I-02-141), *Cronin* (A-97-579) and *Pilot* (A-97-265) advice letters.)

Because section 87101 applies only when conflicts of interest render it impossible for a decisionmaking body to gather a quorum of its members, the first step in answering your question is to determine whether so many council members have conflicts of interest in decisions regarding councilmember Reavis' Complaint that the city council may invoke section 87101.

Under most circumstances, a public agency's legal defense and indemnification of costs incurred by a defendant official are part of the "terms and conditions" of public office or employment, permitting officials sued in their individual capacities to take part in decisions involving such litigation without violating the Act's conflict of interest provisions. (See, e.g., regulation 18702.4, the *Olivas* Advice Letter, No. A-95-068, and the *Battersby*, *Cronin* and *Pilot*, advice letters, *supra*.) So long as a public official is insulated from the foreseeable costs of litigation, he or she ordinarily has no conflict of interest in any decision regarding such litigation.⁴

But when a public agency has no obligation to defend or indemnify a defendant official – as when plaintiff seeks punitive damages for conduct allegedly outside the course and scope of official duty – the official has a conflict of interest in any decision relating to the litigation that would have a reasonably foreseeable, material financial effect on the official. (See, e.g. the advice letters cited above.) The Complaint does seek punitive damages against the defendants, and alleges that their actions were outside the course and scope of their official duties. For purposes of this analysis we will assume that at least two of the five council members (defendants Kelley and MacLean) would have conflicts of interest in such decisions. A third councilmember, Ms. Reavis, cannot be insulated from the economic consequences of her \$10,000 lawsuit, the success or failure of which will necessarily have a material, personal financial effect on her. (Section 87103, regulations 18703.5, 18705.5). When at least three council members have conflicts of interest in decisions relating to the lawsuit, a quorum of the city council can *only* be assembled by means of the "legally required participation" rule given at section 87101 and regulation 18708, as described the *Battersby* Advice Letter, *supra*.⁵

We recognize that you have examined the pertinent law and advice letters, and understand the mechanics of applying the "legally required participation" exception to

⁴ Assuming, of course, that the public official does not have an economic interest in some other person or entity that could itself be materially affected by the litigation.

⁵ The "legally required participation" exception would not ordinarily apply to a city attorney whose duties are to advise the members of the city council, because there is usually an "alternative source of decision" in the form of a specially retained attorney who does not have a conflict of interest in the decisions at hand.

the Act's conflict of interest rules. But the circumstances you have described differ from those addressed in earlier advice letters in one significant particular. In the present case, one of the five council members will be a party adverse to the city and to the other named defendants. We have noted in a number of prior advice letters that when deciding which disqualified officials are "legally required" to participate in a decision, *all* disqualified officials must participate in the selection process. (See, e.g., *Battersby, supra*, and the *Heisinger* Advice Letter, No. A-95-333.)

The purpose of this advice was to foster a neutral selection process by ensuring that all officials who qualify for selection under section 87101 have an equal opportunity to be chosen, minimizing the possibility that the decision might be manipulated through an artfully selected pool. But by its terms, section 87101 applies *only* to public officials disqualified from participating in a decision by reason of a conflict of interest under section 87100. We have never advised that the "legally required participation" exception requires inclusion of persons barred from taking part in a decision by laws *other than* section 87100. A construction of section 87108 that required a city to allow the opposing party to vote on its litigation decisions would plainly be absurd. The permissive language of regulation 18708(c)(3) ("A random means of selection may be used...") provides sufficient flexibility to avoid such an outcome.

Thus in the present case, if the city can lawfully assert a right (such as the lawyer-client privilege at California Evidence Code sections 950 et seq.) to bar participation in litigation decisions by an opposing party, it is not necessary to include councilmember Reavis in the selection process mandated by section 87101. To hold otherwise regarding this or any similar legal privilege could force the city to waive important statutory rights simply to keep an opposing party from compromising its legal defense.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Lawrence T. Woodlock
Senior Counsel, Legal Division

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